IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1987 OF 2006

Gajanan Laxman Kolekar
and ors. .. Petitioners

Vs.

Shahu Corner Nagari Sahakari
Pat Sanstha Maryadeet, and ors. .. Respondents

Mr. P.D. Dalvi for petitioners.
Mr. Amit Borkar for respondent no.1.

CORAM: B.H. MARLAPALLE, J.

Date : June 06, 2006.

P.C.:

1. Heard Mr. Dalvi the learned counsel for the petitioners and Mr. Borkar the learned counsel for the respondent no.1.

2. Rule. Respondent No.1-Society waives service and other respondents are formal parties.

3. Rule is taken up for final hearing forthwith.

4. The petitioners are impleaded as opponents

nos.12 to 15 in Dispute No.285 of 1998 filed before the Co-operative Court at Kolhapur for the recovery of an amount of Rs.10,70,119/- from the opponent no.1 i.e. Shivtej Corporation, a partnership firm. On receipt of the notice from the Co-operative Court, the present petitioners filed their Written Statement and also took out preliminary objection against the maintainability of the dispute so far they are concerned. The Co-operative Court framed issues at Exh.64 and passed an award on 30/4/3004 directing opponent nos.1 to 17 to pay jointly and severally a sum of Rs.10,70,119/- to the disputant society with interest @ 20% P.A. on Rs.8,00,000/- with effect from 22/1/1998 till the recovery of the entire amount. This award came to be challenged in Appeal No.110 of 2004 before the Maharashtra State Cooperative Appellate Court and the learned Member of the said Court was pleased to allow the appeal partly and the trial court award was modified in terms of the finding recorded on Point No.VI therein as set out in para 9 of the said Judgment dated 31/1/2006. In short, the modified award reads as under:-

"9. Out of Opponent No. 2 to 17, 10 opponents have executed power of attorney in favour of other 5 partners all have executed Deed of Partnership, but failed to register said Deed of Partnership. On the basis of said Power of attorney, amounts were received, utilized, hence the opponents No.2 to 17 are liable for the amount received as deposit. If it is their case that said amounts were misappropriated or mis-utilized by opponents No. 2 to 4, then they have different cause of action and they cannot get relieved from the responsibility to pay dues of the disputant society. Hence award against all opponents in trial court requires to be passed. Contentions raised by opponents in trial court are not proved.

. I find the trial court has granted future interest @ 20% p.a. It is wrong to grant 20% future interest, in these days of reducing rate of interest. I also find disputant society had gone beyond byelaws in order to make profits and as such disputant in trial court is not entitled for sympathy of the court or for any equitable relief. Disputant in trial court had compounded interest till 21.1.98 then added notice fee and advocate fee in its claim without it being allowed by any court and then on total dues claimed 20% interest. I find this capitalization of notice fee and advocate fee is bad in law. Considering the irregularity done by disputant in trial court, the disputant is not entitled to any costs. In given circumstances, future interest be allowed only at 9% p.a. Hence by setting aside award passed by trial court, substituted award as discussed above requires to be passed..."

5. The petitioners reiterate their contentions that when they were not the members of the society the dispute was not maintainable against them. The Lower

Appellate Court has recorded a finding that the disputant society had produced the relevant papers along with the resolution admitting the opponents as members and thus the society proved that the opponent nos.2 to 17 were its members, before the Cooperative Court. Mr. Dalvi the learned counsel for the petitioners has taken me through the documents submitted by the society which show that there was nothing on record to prove that the present petitioners, who were impleaded as opponent nos.12 to 15, are members of the respondent-society. The learned counsel for the said society does not dispute the fact that the petitioners were not admitted as its members at any time. On the other hand they justified the award against the petitioners on the ground that they were the sureties to the loan amount sought to be recovered from opponent no.1 and its members. However, the averments in the dispute memo submitted before the Cooperative Court do not refer to the status of opponent nos.12 to 15 and on the other hand the society proceeded on the ground that all the opponents were the members of opponent no.1, partnership firm. The findings of both the courts below so far as the status of the present petitioners

is concerned, showing them as the members of the respondent-society, are grossly erroneous and in the absence of any evidence, there was no reason for the Lower Appellate Court to hold that the present petitioners were proved to be the members of the respondent-society before the Cooperative Court. The impugned award is, therefore, unsustainable against the present petitioners.

6. In the premises, the petition succeeds and the same is hereby allowed by holding that the impugned award passed by the Lower Appellate court modifying the award passed by the Co-operative Court is not enforceable against the present petitioners. Rule is made absolute accordingly. This finding will not come in the way of the respondent-society to take out appropriate other proceedings against the petitioners.

No costs.

(B.H. Marlapalle,J.)